IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No 244 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJIV K. BADLANI

Versus

CYBERMARK BRANDS PVT. LTD.

Appearance:

1. COMPANY PETITION No. 244 of 2000

MR AR GUPTA for Petitioner No. 1

..... for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 16/02/2005

ORAL JUDGEMENT

1. The petitioner has filed this petition under Section 433 (c) of the Companies Act, 1956 for winding up of the respondent Company, on the ground that the respondent Company has not commenced its business, since its incorporation and/or not continued it for the past many years.

2. The petition was admitted on 20/09/2000 and this Court had passed an order regarding advertisement to be published in the "Indian Express", English daily and "Sambhav, Gujarati daily, both of Ahmedabad edition. The Court has also directed the petitioner to publish the advertisement in the Official Gazette. The Court has further observed that notice be issued to the Central Government and to the Official Liquidator. The Official Liquidator was directed to file his report by 18/10/2000 and for this purpose he was permitted to approach the Chartered Accountant out of the panel maintained by him for this purpose, the fees for whom was to be borne by the petitioner. It appears that this order was passed through oversight as the present petition is for winding up of the Company and it is not for sanctioning scheme of arrangement by way of amalgamation and hence, notice to the Central Government or to the Official Liquidator is not at all required. With regard to direction of the publication of the advertisement in the newspapers as well as in the Official Gazette, the said directions were duly complied with and affidavit to this effect was filed before this Court on 17/10/2000 along with which relevant newspaper cuttings as well as copy of the Government Gazette containing the advertisement as directed by this Court were placed on record.

3. Despite service of notice as well as publication of the advertisement, nobody appears on behalf of the respondent Company nor any objection was raised against the winding up of the respondent Company. Therefore, the Court proceeds with final hearing of this petition.

4. Mr. A.R. Gupta learned advocate for the petitioner has submitted that the respondent Company was registered on 31/01/1983 for the purpose of carrying on business as stated in the object clause of the Memorandum of Association. Mr. Gupta has further submitted that the petitioner and other subscriber to the Memorandum namely, Shri Rajendra R Tiwari were the first subscribers/members of the Company. Mr. Gupta has further submitted that the business of the Company was commenced after its incorporation and carried on till 31/12/1987. However, on account of various difficulties, particularly, financial stringency, the Company was constantly making losses. The Company could not raise sufficient finance to carry on its business. The other Director namely, Shri Rajendra R Tiwari, has failed to raise any finance at all. Whatever, finance/loan were required, were brought in by the present petitioner. In these circumstances, the business of the Company could

not continue its business and completely suspended its operation with effect from 01/01/1988 and thereafter could not commence its business.

4.1. Mr. Gupta learned advocate for the petitioner has submitted that the second reason of the closure of the business of the Company with effect from 01/01/1988 was that Shri Paresh J Shah did not participate in the activities of the Company and did not take any action for raising necessary finance for the purpose of recommencing the business of the Company. Besides that in the year 1986 itself, the said Mr. Tiwari migrated to Kenya and, therefore, Mr. Paresh J Shah was appointed as Second Director with effect from 04/04/1986. On account of adverse financial position, the petitioning Director was also not in a position to single handedly raise the finance for commencing and running the affairs of the Company. In these circumstances, the Company could not restart its business for achievement of its object as set out in the Memorandum of Association from January, 1988 and accordingly, the Company has not been able to restart its business for the last about twelve years and hence, its business is closed for the last about twelve years.

4.2. Mr. Gupta has further submitted that the financial position of the respondent Company from the date of its incorporation was that the Company has paid up capital of Rs.20=00 only, which was also spent on miscellaneous expenses. The expenses incurred for incorporation of the Company and provided by the petitioner were not debited to the Company. Mr. Gupta has further submitted that apart from this liability payable to the contributories of the Company, there is no other liability payable by the Company to any third party. He has further submitted that there are no Government dues including Sales Tax or Income Tax, which were payable by the Company. He has further submitted that there are only two shareholders namely, the petitioner and said Shri Paresh J Shah. On these facts, he has further submitted that since the petitioner Company has not been able to recommence its business from the date of its closure i.e. 31/12/1997 till the date of the filing of the petition, there is no likelihood of the Company commencing its business and hence, the Company is required to be wound up by this Court in the interest of justice as well as in the interest of the shareholders of the Company. He has further submitted that there is a specific provision contained in Companies Act, 1956 which states that if the Company is not able to commence its business within one year from the date of its incorporation, the Company is required to be wound up.

He has, therefore, submitted that this Court should pass an order for winding up of the respondent Company.

4.3. In support of his submissions, Mr. Gupta has relied upon the decision of the Rajasthan High Court in the case of Surendra Kumar Pareek v. Shree Guru Nanak Oil Mills Pvt. Ltd., reported in (1995) 82 Company Cases 642, wherein the Court has observed that the petitioner as a sole Director of the Company filed a petition for winding up of the Company under Section 433 (c) and that since the Company did not commence its business within a year of incorporation and the business stood suspended for several years, the Company had to be wound up under Clauses (c) & (d) of Section 433 of the Companies Act, 1956.

4.4. Mr. Gupta has further relied upon the decision of the Patna High Court in the case of Registrar of Companies, Bihar v. Shreepalpur Cold Storage Pvt. Ltd. reported in (1974) 44 Company Cases 479, wherein the Court has held that substratum of the Company must be deemed to have gone; (a) when the subject matter of the Company has gone, or (b) the object for which it was incorporated as substantially failed, or (c) it is impossible to carry on the business of the Company except at loss or (d) the existing and probable assets are insufficient to meet the existing liabilities. The Court has further observed that the Company had been closed for more than a year and there was no hope at all for its functioning in the future and nobody seemed to be interested in running the Company and trading in its name, it would therefore just and equitable that the Company should be wound up under Section 433 (c) & (f) of the Companies Act, 1956. Mr. Gupta has further relied on the decision of the Kerala High Court in the case of A. Shreedharan Nair v. Union Hardwares (Pvt.) Ltd., reported in (1997) 89 Company Cases 37, wherein, it is held that the petition for winding up of the respondent Company was filed under Section 433 (c) of the Companies Act, 1956 on the ground that the Company had suspended its business for a whole year. The Court has further held that since the ground urged under Section 433 (c) viz., suspension of business for more than one year, stood clearly established, there was sufficient justification for winding up of the Company, especially in view of the majority opinion of the shareholders expressed in special meeting called for this purpose.

4.5. Lastly, Mr. Gupta has relied upon the decision of this Court rendered in somewhat similar circumstances in the case of Rajiv K. Badlani v. Page-Halton Brands

Pvt. Ltd., decided on 22/03/2002 in Company Petition No. 236/2000, wherein the Court has taken the view that Section 433 (c) of the Companies Act, 1956 requires that if respondent cannot commence its function within a year from its incorporation or suspends its business for whole year, it is liable to be wound up. The Court has further held that from the undisputed facts, which have come on record, it is apparent that the Company has not commenced any business for a period of more than 18 years from the date of its incorporation and taking into consideration the financial affairs as available on record, there is no likelihood that the Company can even otherwise, commence its activities. Therefore, the Court thought that the case for winding up of the Company under the provisions of Section 433 (c) of the Companies Act.

5. After having heard learned advocate and after having considered the contents of the petition and documents attached therewith as well as after having considered the authorities cited before the Court, the Court is of the opinion that the respondent Company did not recommence its business from its closure. The Company was incorporated in the year 1983. The petition was filed in the year 2000 and till the date of filing of the petition, no business activities were carried on by the petitioner. Even as on today, the Company did not recommence its business activities after its closure. There are only two shareholders or financial subscribers. Immediately after incorporation, one of them as stated by Mr. Gupta and as also averred in the petition, has not participated in the business activities of the Company. There was no liability at all on the part of the Company and no funds are available to carry on its business. Looking to the totality of the circumstances, the Court is of the opinion, that there is no possibility of the Company being able to carry on its business activities in future. It is, therefore, just and proper case, where the Court has to invoke its jurisdiction under Section 433 (c) of the Companies Act. Accordingly, the respondent Company is hereby, ordered to be wound up. The Official Liquidator attached to this Court is appointed as Official Liquidator of the Company and is directed to exercise the powers vested in him under the Companies Act, 1956.

The petition is accordingly allowed.

[K.A. PUJ, J.]

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